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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Petitioners,

v.

ALLIED INTERNATIONAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF OCCIDENTAL CHEMICAL COMPANY IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF OCCIDENTAL CHEMICAL COMPANY IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE *

Occidental Chemical Company (hereinafter "Occidental") is a Delaware Corporation that is engaged, *inter alia*, in the business of importing potash, urea and ammonia from the Union of Soviet Socialist Republics pursuant to a long-term bilateral trade agreement. Occidental regularly receives import shipments of these commodities at various ports on the East and Gulf coasts of the United States, including Savannah and Port of Brunswick, Georgia. Occidental retains various companies to perform the stevedoring work necessary to transfer these cargoes from ocean-going vessels. These

* This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.

companies, in turn, have agreements with union locals affiliated with the International Longshoremen's Association, AFL-CIO (hereinafter "the ILA"), one of the Petitioners herein, by which the locals have contracted to supply workers to assist in the stevedoring operations.

After ILA President Gleason issued his January 9, 1980 directive ordering ILA locals not to handle cargoes destined to or originating in the Soviet Union,[1] ILA Locals 1414 and 1423 refused to supply Occidental's stevedoring companies with the workers needed to assist in the unloading of various ocean-going vessels. Occidental filed unfair labor practice charges on February 19, 1980, alleging violations of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B) (hereinafter "the NLRA" or "the Act").

Subsequently, a hearing in this matter was held on September 4 and 5, 1980, in Savannah, Georgia, before Administrative Law Judge Bernard Ries.[2] Occidental's case was consolidated, for purposes of briefing only, with cases in which other concerns affected by the ILA's boycott, including Allied International, Inc., Respondent herein, and the American Farm Bureau Federation, were the charging parties. The administrative law judge issued separate decisions on March 16, 1981 dismissing the complaints of all charging parties on the grounds that the disputes were not "in commerce" and, therefore, were beyond the jurisdiction of the National Labor Relations Board (hereinafter "the Board"). On August 28,

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[1] The directive is set out in full at footnote 2 in the opinion of the court below, *Allied International, Inc. v. ILA*, 640 F.2d 1368, 1369-70 (1st Cir. 1981), 3a.

[2] Prior to this hearing, on March 4, 1980, the United States District Court for the Southern District of Georgia issued an Order granting a preliminary injunction under Section 10(l) of the Act, 29 U.S.C. § 160(l). On September 25, 1980, the United States Court of Appeals for the Fifth Circuit reversed the district court's award of Section 10(l) relief. *Baldovin v. ILA*, 626 F.2d 445 (5th Cir. 1980).

1981, the Board, in the case brought by Allied International, 1-CC-1753, reversed Judge Ries' decision, finding that it had "jurisdiction over the allegedly unlawful secondary effects of a primary dispute between an American union and a foreign nation." *International Longshoremen's Association, (Allied International)*, 257 N.L.R.B. No. 151 (August 28, 1981), slip op. at 1. Occidental's appeal has yet to be decided by the Board.

Accordingly, Occidental has a substantial interest in the outcome of the instant case, in that this Court's decision will determine whether Occidental, and the stevedoring companies with which it does business, will be able to avail themselves of the protections offered by the NLRA against secondary boycotts.

SUMMARY OF ARGUMENT

As the First Circuit and the Board have correctly determined, the ILA, through its boycott of goods originating in or destined for the Soviet Union, has "engaged in conduct classically subject to and violative of Section 8(b)(4) of the National Labor Relations Act." *Allied International*, 257 N.L.R.B. No. 151, slip op. at 1. The ILA directed its members to refuse to perform longshoring services for various American companies, hoping thereby to disrupt existing business relations among American companies and eliminate trade between certain of these companies and the Soviet Union. That the ILA's boycott was politically motivated does not allow it to escape the express prohibitions of Section 8(b)(4), which in no way distinguishes between economically and politically inspired boycotts. Indeed, as the First Circuit observed, it is more rather than less objectionable that the ILA has used its statutorily derived powers in aid of objectives extraneous to legitimate trade union concerns. *Allied International v. ILA*, 640 F.2d 1368, 1378 (1st Cir. 1981), 21a.

The ILA erroneously asserts that its boycott was not "in commerce" within the meaning of the Act. This contention is based upon an incorrect reading of this Court's

decisions in a series of cases, including *Windward Shipping (London) Ltd. v. American Radio Association*, 415 U.S. 104 (1974), in which the Court held that the Act did not apply to labor disputes directed at the use and operation of foreign-flag ships when the application of the Act to such disputes threatened to interfere or conflict with foreign labor or maritime laws or policies.

The rationale of the foreign-flag ship cases plainly indicates that these cases do not preclude application of the NLRA to the ILA's boycott. As this Court stated in *Windward*, the Court's decisions in these cases were all based on the principle "that Congress when it used the words 'in commerce' [in the NLRA], simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade." 415 U.S. at 112-13. Because the ILA's boycott was not directed at the use or operation of foreign flag ships, but was instead designed to disrupt existing trade with the Soviet Union, regardless of how the commodities in question were transported, neither the shipboard labor relations of the boycotted vessels nor international maritime laws or policies were in any way affected by the boycott. Accordingly, no identifiable comity interest would be served by construing the NLRA so that it would not apply to the ILA's boycott.

Nor would application of Section 8(b)(4) of the Act to the ILA's conduct violate the free speech guarantees of the first amendment. Even if the ILA's boycott can be characterized as a form of political expression, this Court has held repeatedly that disruptive conduct which incidentally serves to express a political message is not immune from reasonable government regulation.

ARGUMENT

I. THE FIRST CIRCUIT CORRECTLY HELD THAT THE ILA'S BOYCOTT VIOLATED SECTION 8(b)(4) OF THE NATIONAL LABOR RELATIONS ACT

Both the First Circuit and the Board were correct in concluding that the ILA has "engaged in conduct clas-

sically subject to and violative of Section 8(b)(4) of the National Labor Relations Act." *Allied International*, slip op. at 1. By exhortation and by direct command the ILA induced and encouraged its members to engage in strikes and to refuse to perform services in the course of their employment within the meaning of Section 8(b)(4)(i). Moreover, by publicly proclaiming its strike intent and by refusing to furnish longshoremen to neutral parties, such as the various stevedoring companies used by Occidental, the ILA threatened, coerced and restrained persons engaged in commerce within the meaning of Section 8(b)(4)(ii). Finally, because the ILA took these measures, at least in part, to disrupt business relations between neutral stevedoring companies and other companies such as Allied and Occidental, and thereby further its goal of eliminating trade with the Soviet Union, the ILA's actions had an object within the ban of Section 8(b)(4)(i)(ii)(B), *viz.*, the forcing of one person to cease doing business with another.

It is not disputed that the ILA's boycott was motivated by the Soviet Union's invasion of Afghanistan. Nonetheless, the legal issues presented by the ILA's boycott are more clearly understood if the various importers, such as Allied and Occidental, are considered to be primary employers.[3] The boycott could not, and was never intended to, exert sufficient economic pressure on the

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[3] The First Circuit's alternative reasoning to the effect that the primary dispute in these cases was between the ILA and the Soviet Union also leads to the correct conclusion that the NLRA is applicable to the ILA boycott. 640 F.2d at 1372, 9a. Occidental's analysis, maintained throughout all of the ILA boycott litigation in which it has been involved, is preferable in that it sets the instant dispute in more conventional Section 8(b)(4) terms, thereby clearly demonstrating that the ILA's conduct was "tactically calculated to achieve union objectives elsewhere." *National Woodwork Manufacturer's Association v. NLRB*, 386 U.S. 612, 644-45 (1967). This theory also more clearly exposes the speciousness of the ILA's contention that the instant dispute is not "in commerce" within the meaning of the Act. *See* pp. 9-22, *infra*.

Soviet Union to prompt its withdrawal from Afghanistan. In reality, the primary objective of the ILA's work stoppage was to force Occidental, and others trading with the Russians, to forego that business. The primary objective of the ILA's work stoppage would have been accomplished as soon as Occidental and other American companies lawfully dealing with the Soviets acceded to the secondary pressures the ILA exerted against neutral stevedoring companies with which it has collective bargaining agreements. Thus, it is not true that this case involves only the ILA's dispute with Soviet policies in Afghanistan; indeed, the entire boycott has been directed at American companies trading in Russian products.[4] As the lower court correctly observed, this boycott has an "all American cast." 640 F.2d at 1374, 13a.

The political motivation of the ILA's boycott makes it no less a violation of Section 8(b)(4). The Board and almost every court that has passed on this issue have decided that the existence of a primary labor dispute is not a prerequisite for "the invocation of Section 8(b)(4)'s protections." *Allied International*, slip op. at 11. *Accord, Soft Drink Workers Local 812, IBT v. NLRB*, 105 L.R.R.M. 2658 (D.C. Cir. 1980); *NLRB v. Twin City Carpenters District Council*, 422 F.2d 309 (8th Cir. 1970); *National Maritime Union v. NLRB*, 346 F.2d 411 (D.C. Cir.), *cert. denied* 382 U.S. 840 (1965); *National Maritime Union v. NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965); *NLRB v. Washington-Oregon Shingle Weavers District Council*, 211 F.2d 149 (9th Cir. 1954). *But cf. NLRB v. ILA (Ocean Shipping)*, 332 F.2d 992 (4th Cir. 1964). These decisions recognize that the harm suffered by neutral employers

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[4] The form of this boycott and the absence of picketing or other conduct aimed directly at the Soviet Union confirms that the boycott's primary objective was to force Occidental and similarly situated companies to cease dealing with the Soviet Union.

is no less serious simply because a boycott is not the result of a primary labor dispute. Indeed, as the First Circuit observed below, the fact that the ILA's boycott was politically motivated all the more clearly condemns it as activity proscribed by Section 8(b)(4):

> We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity.

640 F.2d at 1378, 21a. In short, the gravamen of the prohibition against secondary boycotts is the involvement of neutral parties in "controversies not their own," irrespective of the reason for the union's illegal secondary pressure. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951).

This conclusion is compelled by the express language of the relevant statutory prohibitions themselves, buttressed by the legislative history. Section 2 of the Act, 29 U.S.C. § 152, specifically defines the term "labor dispute." Although this term is used in other provisions of the Act, it is nowhere employed in Section 8(b)(4). *Cf.* 29 U.S.C. § 160(a). It is a well recognized rule of statutory construction that when Congress has carefully employed a term in one section of a statute and has excluded it in another, the courts "cannot supply what Congress has studiously omitted." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). Section 8(b)(4) is broadly worded to cover any attempt to threaten, coerce, or restrain employers or to induce or encourage employees to engage in certain conduct for the purpose of "forcing any person . . . to cease doing business with any other person."

Had Congress intended to limit the prohibition against secondary boycotts to situations involving a traditional labor dispute, that result could easily have been achieved.

Congress did not intend to do so, and there is no indication in the legislative history that such a narrow construction of the Act's secondary boycott provisions was contemplated. To the contrary, the legislative history of Section 8(b)(4) establishes that Congress designed these provisions to prohibit every type of activity that falls within the literal language of Section 8(b)(4). As Senator Taft, the bill's sponsor stated:

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts.

93 Cong. Rec. 4323 (1947), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1106 (1948).

The ILA's claim that the motive for its boycott precludes the application of Section 8(b)(4) is thus without merit. This Court has made it clear that one must look beyond a union's explanation of its motivation and examine the totality of the conduct complained of to determine whether the objective claimed by the union is the sole motive of the union's conduct, or whether the conduct has some other object that is proscribed by Section 8(b)(4). *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 511 (1977). Claiming a political motive for illegal secondary conduct is no different from asserting the preservation of existing work as a legitimate objective of the secondary conduct; neither claim should be taken at face value.[5]

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[5] It would be the rare union indeed that would not defend a secondary boycott charge by asserting *some* legitimate reason for its conduct. In other "mixed motive" cases, the Board has routinely rejected such claims where the totality of the union's conduct shows an objective within the ban of Section 8(b)(4). *See e.g., Local 441, IBEW*, 208 N.L.R.B. 943 (1974) (asserted area standards picketing); *Glaziers Local 513*, 158 N.L.R.B. 1621 (1966) (informational picketing); *IBEW Local No. 11*, 154 N.L.R.B. 766 (1965) (area standards picketing); *United Wholesale & Warehouse Employees, Local 261*, 125 N.L.R.B. 520, 524 (1959) (consumer information

Petitioners assert no cogent reason why the ILA boycott does not violate Section 8(b)(4) of the Act.[6] Accordingly, the First Circuit's well-reasoned decision ends the discussion, absent some particular reason why the protection of the Act should be denied in this case.

II. THE ILA'S BOYCOTT IS "IN COMMERCE" WITHIN THE MEANING OF THE ACT

The critical question in this case is whether the ILA's conduct, despite being the type of activity that is clearly proscribed by Section 8(b)(4), is sufficiently related to commerce to come within the prohibitions of the Act. The ILA acknowledges that its conduct was directed at a number of American companies, including Occidental and the various stevedoring companies employed by Occidental, which were engaged in activities "in" and "affecting commerce" within the literal wording of the Act.[7]

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picketing). *Accord, Soft Drink Workers Local 812, IBT v. NLRB*, 105 L.R.R.M. 2658 (D.C. Cir. 1980) (work preservation picketing). *See also NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607 (1980).

[6] The ILA's claim that there is no evidence of a proscribed object, Brief for Petitioners at 24, ignores both this Court's precedent and common sense. It is well-settled that Section 8(b)(4) is violated if *an* object of the union's conduct is unlawful, *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. at 689, and that the statute proscribes union secondary pressure even if something less than a complete cessation of business results. *NLRB v. Local 825, International Union of Operating Engineers (Burns & Roe)*, 400 U.S. 297, 304-305 (1971). Common sense leaves no doubt that *an object* of the boycott was to force the neutral stevedores to stop doing business with companies like Allied and Occidental, in order to force them to stop doing business with the Soviets. It is far too late in the day for the ILA to contend that it should not be held to the natural and forseeable consequences of its actions. *Local 761, International Union of Electrical Radio & Machine Workers v. NLRB*, 366 U.S. 667, 674 (1961).

[7] Both the disruption of commerce and interference with American foreign policy caused by the ILA boycott are well documented. Comment, *Protest Boycotts and Federal Labor Laws: The Russian*

Nonetheless, the ILA, relying principally on this Court's decisions in *Windward* and the related case of *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215 (1974), contends that, because its boycott was ultimately motivated by its disapproval of the foreign policy of the Soviet Union, the secondary boycott provisions of the Act do not reach its conduct. This contention is premised on a misunderstanding of the rationale of the Supreme Court's decisions in *Windward* and *Mobile*.[8]

Mobile and *Windward* were but the most recent in a line of cases beginning with *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), in which the Court grappled with the legal implications of various attempts by American unions in differing circumstances to impact the "maritime operation of . . . foreign ships." *Wind-*

Trade Boycott Litigation, 3 NW. J. INT'L L. & BUS. 211 (1981). The ILA's historical penchant for engaging in this kind of conduct thus makes application of the Act fully consistent with its underlying principles. *Id.* at 248. Only yesterday, for example, the ILA announced a boycott of all cargo destined to or originating in Poland. *Wall St. J.*, Dec. 22, 1981 at 14, col. 3. This kind of conduct confirms the wisdom of the First Circuit's warning about the "danger of uncontrolled whimsical activity." 640 at 1378, 21a.

[8] That the ILA misreads the foreign-flag ship cases is clear from its analytical approach to this case. The ILA suggests that the Court in those cases started from the premise that the Act did not apply, and that the specific exemption to Board jurisdiction recognized in those cases was but one example of the general non-applicability of the Act to disputes involving foreign entities. In the ILA's words, "the Court has never attempted to limit the non-applicability of the LMRA to foreign maritime concerns or foreign labor matters." Brief for Petitioners at 11 n.9. This orientation places the cart squarely before the horse. The conduct at issue in this case is indisputably "in commerce" as that term is commonly understood. The question then becomes one of determining whether there is some reason to exempt this activity from the normal reach of the Act. Thus, it is the ILA's burden to show why the Act should not be given its routine meaning merely because a political protest is involved in this case, and not Allied's responsibility to show that the Act applies to what would otherwise be a garden-variety secondary boycott.

ward, 415 U.S. at 114. The overriding concern of the Court in all these cases was to accommodate the broad grant of jurisdiction given to the Board[9] with the need to avoid intrusion into international maritime law and the labor policies of foreign-flag ships and, derivatively, of foreign governments. Understanding the precise rationale of this Court's decisions in the foreign flag ship cases—the need to imply an otherwise completely unjustified exception to the Board's jurisdiction in order to honor longstanding principles of comity and accommodation—is important because what is most striking about the instant case is that no comity interest could possibly be served by restrictively interpreting the NLRA so that it would not apply to the ILA's conduct. Once that rationale is understood, it is immediately apparent that the First Circuit was correct in rejecting the argument that the considerations underlying the foreign-flag ship cases were at all relevant in determining the application of the NLRA to the ILA's secondary activity.

Benz was an appeal from an Oregon state court judgment awarding damages under Oregon law against American unions that picketed a foreign-flag vessel temporarily in United States waters. The vessel was operated by foreign seamen under foreign articles of agreement. Dissatisfied with the wages and working conditions specified therein, the crew struck, designating an American union as their collective bargaining representative. Various unions subsequently picketed the ship in support of the crew's demands until the picketing was enjoined.

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[9] Section 10(a) of the Act grants jurisdiction to the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a). This Court on several occasions has held that Congress, in enacting the NLRA, sought to exercise its power under the commerce clause to the fullest extent constitutionally permissible. *Guss v. Utah Labor Board*, 353 U.S. 1, 3 (1956); *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).

The question before this Court in *Benz* was whether the Board had jurisdiction over the dispute, thereby preempting the Oregon state court. While it was clear that Congress was constitutionally empowered to make the Act applicable to labor disputes arising on foreign ships docked in American ports, the Court reviewed the Act and its legislative history and concluded that, in the absence of an "affirmative intention clearly expressed," Congress could not be thought to have intended to intrude into the labor relations of a foreign entity by extending the jurisdiction of the Act to cover "labor disputes between nationals of other countries operating ships under foreign laws." 359 U.S. at 143. Restricting the Board's jurisdiction in these circumstances was appropriate because "the possibilities of international discord [were] so evident and retaliative action so certain." 359 U.S. at 143.

Avoidance of conflict with foreign labor or maritime laws was the basis for this Court's later decisions in the companion cases of *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) and *Incres Steamship Co. v. Maritime Workers*, 372 U.S. 24 (1963). In *McCulloch* this Court held that the Board had no jurisdiction to conduct a representation election on Honduran vessels manned by Honduran crews. An American union seeking to organize the crews had filed a representation petition with the Board. This Court, stressing that the Board's assertion of power had "aroused vigorous protests from foreign governments," 372 U.S. at 17, found that the Act "as written was [not] to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19.[10] A different interpretation of

[10] The Court's analysis has been described as relying on a "territorial interpretation" of the Act. Comment, *Annual Survey of Labor Law*, 20 B.C.L. REV. 63, 66 (1978). *McCulloch* thus limits the application of the Act "to those instances where neither the situs nor the impact of the labor dispute were within the territorial United States." *Id.* at 66. It requires little argument to prove that both the situs and the impact of the ILA's boycott are within the territorial United States and thus in commerce.

the jurisdictional provisions of the Act, which would have allowed the United States to exercise its "jurisdiction over and apply its laws to the internal management and affairs" of foreign flag carriers, would have resulted in "considerable disturbance not only in the field of maritime law but in international relations as well." 372 U.S. at 19-20.[11]

The result in *Incres* followed from *McCulloch*. *Incres* involved an American labor union which, in pursuit of its attempt to organize the foreign crews of two Liberian registered ships, picketed the two ships, thereby persuading longshoremen and tugboat crews not to service them. The ships' owners successfully sued for an injunction in a New York state court. This Court decided that the Board did not have jurisdiction over the dispute, stating that it did not think that a "different result as to Board jurisdiction [followed] from the fact that" *Incres* involved "the picketing of a foreign-flag ship by an American union", 372 U.S. at 27, whereas *McCulloch* dealt with the Board's attempt to conduct a representation election on a foreign-flag ship. The Court concluded that neither representation elections nor unfair labor practices involving foreign-flag ships are within the jurisdiction of the Board since "foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6)" of the Act. 372 U.S. at 27. In so construing the Act, this Court again stressed the possibility of conflict with foreign labor and maritime laws, observing that the American union's activities were "directly related to Incres' employer-employee relationships." 372 U.S. at 28.

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[11] The concern over principles of comity articulated in *McCulloch* was a very real one, as the assertion of Board jurisdiction there, contrary to established principles of international maritime law and policy, could well have sparked an international incident. The difference between the effect of Board jurisdiction in *McCulloch* and in the instant case is so striking as to require no further comment. Since the comity concern expressed in later cases is derived from *McCulloch*, it is clear that they are equally inapposite.

The Court has made clear, however, that the application of the Act does not depend on the mere fact that a foreign entity may have some involvement in a dispute otherwise in commerce.[12] Thus, in *ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), this Court affirmed the jurisdiction of the Board over secondary picketing by American longshoremen in protest of substandard wages paid to United States resident long-

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[12] In fact, the Board has held repeatedly that the presence of foreign entities in domestic disputes is no bar to its jurisdiction. For example, the Board has asserted jurisdiction over an organizing campaign directed at the Chicago branch office of the official banking agency of the government of India. *State Bank of India*, 229 N.L.R.B. 838 (1977). In that case, the Board declined to read *Benz* and *McCulloch* as grounds for refusing to apply the Act, finding that neither case "dealt with the issue of foreign governments or their agents as employers doing business within the territorial United States." 229 N.L.R.B. at 841. The Board distinguished *Benz* and *McCulloch* concluding that they were based on the Court's reluctance to give "extraterritorial effect" to the Act, thereby involving the Board in the "delicate field of international relations." 229 N.L.R.B. at 841 (quoting *Benz*, 353 U.S. at 147). Given that both the situs and the impact of the dispute involved in *State Bank of India* were within the territorial United States, the Board found no impediment to its jurisdiction in the fact that the bank was arguably an instrumentality of a foreign government, absent a showing of the likelihood of international conflict. 229 N.L.R.B. at 841. A similar result obtained in *S.K. Products Corp.*, 230 N.L.R.B. 1211 (1977), in which jurisdiction was asserted over a dispute involving a company that was a wholly-owned subsidiary of a Yugoslavian enterprise closely related to the government of that country. The Board explained its assertion of jurisdiction by stating that:

> We are bound to ensure the enforcement of the Federal statute we administer and to afford employees in this country the freedom and rights and duties specified by that statute. By asserting jurisdiction herein, we are exercising national sovereignty in accord with generally accepted rules of international law. *We see no possible conflict*, under the charter of the United Nations or the constitution of the Socialist Federal Republic of Yugoslavia, with the Yugoslav government.

Id. at 1214 (emphasis added). *Accord, Great Lakes Dredge and Dock Co.*, 240 N.L.R.B. 197 (1979).

shoremen performing work on foreign vessels. The Court found "no evidence that [the resident longshoremen] were involved in any internal affairs of [the ships] which *would be governed by foreign law.*" 397 U.S. at 199 (emphasis added). The Court concluded that "[a]pplication of United States law to resolve a dispute over the wages paid the [nonunion American] men for their longshore work . . . would have threatened no interference in the internal affairs of foreign-flag ships *likely to lead to conflict with foreign or international law.*" 397 U.S. at 200 (emphasis added).

Benz, *McCulloch*, *Incres*, and *Ariadne* clearly establish that the criterion for determining whether the Act applies to disputes involving foreign entities is whether the exercise of Board jurisdiction would lead to a conflict with foreign labor or maritime laws or policies. Where foreign or international maritime law is not impacted by the Board's assertion of jurisdiction in a domestic dispute, these cases provided no support for concluding that the Act should not apply. Careful analysis of *Windward* and *Mobile* necessarily begins with this recognition.

In *Windward* members of several American maritime unions picketed foreign flag ships which employed foreign crewmen at wages substantially below those paid to American seamen. The dispute in *Windward* grew out of traditional labor concerns and was directed at foreign-flag ships whose employment practices were objectionable to American seamen. Simply put, the American seamen wanted jobs which they believed were unjustly being taken from them by foreign seamen who were willing to work for a lower rate of pay.

The Court began its analysis with this description of the earlier foreign flag ship cases:

> In a series of cases decided over the past 17 years, this Court has discussed the application of the Labor Management Relations Act in situations which might be *broadly described as disputes between unions rep-*

> *resenting workers in this country and owners of foreign flag vessels* operating in international maritime commerce.

415 U.S. at 109 (emphais added). Thus, the *Windward* Court thought that a "broad" reading of the dispositive cases would be one characterizing them as cases involving labor disputes directed at the operation of foreign-flag vessels. The Court reasoned that the Board lacked jurisdiction in those cases in which application of the Act could be used "to erase longstanding principles of comity and accommodation in international maritime trade." 415 U.S. at 113.[13]

The Court then turned to the specific situation presented in *Windward* and observed:

> The picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*; respondents seek neither to organize the foreign crews for purpose of representation nor to support foreign crews in their own wage dispute with a foreign shipowner. But those cases do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable.

Id. at 113-14. This Court, thus, unequivocally described the case before it as one involving a labor dispute the objective of which was to interfere "with the maritime operations of foreign vessels." Although the case did "not involve the inescapable intrusion into the affairs of foreign ships" found in earlier cases, it is clear that "intrusion into the affairs of foreign ships" was still the problem confronting the Court. In the earlier foreign-flag ship cases American unions directly interfered with the ship-

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[13] The nature of the *Windward* Court's concern is also shown by its reliance on *Lauritzen v. Larsen*, 345 U.S. 571 (1953), interpreting the Congressional intent of the Jones Act, and its announced reluctance to disrupt the "comprehensive body of [maritime] law." 415 U.S. at 113.

board labor relations of foreign flag vessels by attempting to organize the existing crew or by supporting the existing crew's wage demands. In *Winward*, the American unions were seeking jobs for American workers, but their method for realizing this goal, the picketing of foreign flag ships, while indirect, nonetheless threatened to interfere with the use and operation of these ships. The statement that the intrusion there was not "inescapable" means only that the Court concluded that principles of comity would preclude the exercise of Board jurisdiction in situations that would cause a conflict with international maritime trade other than those presented by the precise facts of cases such as *McCulloch*. There is not one word in *Windward* to suggest that this Court was setting forth principles that would be applicable to all labor disputes involving foreign entities, much less politically motivated disputes between American employers and American unions and employees remotely caused by the actions of a foreign government. The Court merely clarified the principles articulated in the earlier foreign-flag ship cases to the effect that the Act should not be extended to situations that would cause a conflict with "foreign or international law." *Ariadne*, 397 U.S. at 200.

The situation in *Windward* stands in sharp contrast to that of the instant case in which the gravamen of the ILA's complaint was not directed at the operation or use of foreign flag ships. It mattered not at all to the ILA whether the boycotted Soviet cargo was carried in Soviet ships, American ships employing union labor, or automated tubs employing robot pilots. The ILA engaged in secondary pressure because, for political reasons, it hoped to coerce Occidental and other employers into stopping trade with the Soviet Union. The dispute in this case was not directed at the operation or use of foreign-flag ships; application of the Act would not result in a conflict with foreign or international law.

The foreign-flag ship cases are, therefore, inapposite to the instant case. Accordingly, detailed analysis of this

Court's later decision in *Mobile* is not warranted.[14] *Mobile* is identical to *Windward*, with the exception that the plaintiff in *Mobile* was an association representing American stevedoring companies rather than a foreign shipowner. *Mobile*, 419 U.S. at 219. As in *Windward*, the *Mobile* Court was concerned with the consequences of the exercise of Board jurisdiction over a dispute directed at foreign-flag ships. The Court concluded that the Board was without jurisdiction because "Congress did not intend to strain through the filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels." *Id.* at 228. The contrast between the dispute in *Mobile* and the dispute in the instant case could not be more apparent. No intrusion, inescapable or otherwise, into the affairs of foreign-flag ships could possibly result from the application of the NLRA to the dispute in this case.

The significance of *Mobile* in this case is the Court's recognition that its holding:

> need cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. *See Madden v. Grain Elevator Workers Local 418*, 334 F.2d 1014 (CA7 1964), cert. denied, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418 v. NLRB*, 376 F.2d 774, cert. denied, 389 U.S. 932 (1967).

Id. at 225 n.10. The *Grain Elevator Workers* cases involved concerted refusals by American unions representing American employees to load an American shipper's grain onto Canadian ships because of the Canadian em-

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[14] The ILA's suggestion that *Mobile* implies that application of the NLRA to this case would amount to an illegitimate "bifurcation" of the dispute is without merit. Such an assertion begs the very question posed in this case: should *Windward* and *Mobile* be extended far beyond their holdings and rationales to extend to any domestic dispute involving a foreign entity.

ployer's dispute with Canadian unions. This Court's approval of the decisions in these cases clearly indicates that the mere fact that a dispute is occasioned by the actions of a foreign entity does not, without more, imply that the dispute, insofar as it involves American employers, unions and employees, is not subject to the provisions of the NLRA. A restrictive interpretation of the reach of the Act is warranted only if its application would pose a danger of conflict with foreign labor or maritime laws or policies.

Because *Windward* and the other foreign flag ship cases are distinguishable, language in *Windward* to the effect that the Board was without jurisdiction because "the protest . . . could not be accommodated by a wage decision on the part of the shipowners which would affect wages paid within this country," 415 U.S. at 114, or because "none of the predictable responses of a foreign shipowner to picketing of this type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate," *id.* at 115, is simply irrelevant to this case. The quoted language makes sense only in the context of a labor dispute that is directed at the operation and use of foreign-flag ships. Of course there is no wage decision affecting American workingmen, or any other decision about terms and conditions of employment, that could have accommodated the ILA in this case; however, that is for the rather obvious reason that, unlike the picketing unions in *Windward* and *Mobile*, the ILA was not disputing the terms and conditions of employment of American workers, or the terms and conditions of employment of foreign workers.[15]

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[15] To the extent that the ILA's boycott did have a business-related objective it was to force Occidental, and the other importers and exporters, to cease dealing with the Soviet Union. Accordingly, even if it were true that *Windward* stands for the general proposition that the NLRA does not apply to disputes which can only be resolved through decisions on the part of foreign entities, the

The ILA is thus mistaken when it seizes upon these isolated passages from this Court's decision in *Windward* and converts them into an all-purpose test for determining the applicability of the NLRA to disputes involving foreign entities. Brief for Petitioners at 5, 9, 12. From *Benz* through *Mobile* this Court was concerned with one thing: developing a test for determining the jurisdiction *vel non* of the Board over labor disputes directed at the use and operation of foreign flag ships. The ILA's position essentially is that this Court should employ the test it developed for Board jurisdiction in this one particular type of case for all cases that in some way involve foreign entities. However, as the First Circuit concluded, there is no warrant for extrapolating *Windward* beyond its holding. An extension of *Windward* would make sense only if there were a policy reason for doing so. If anything is clear about this case it is that no identifiable policy could possibly be served by this Court's holding that the NLRA was inapplicable to the ILA's conduct. The foreign-flag ship cases and the instant case differ in this essential respect: in the instant case there is no labor dispute directed at the use and operation of foreign-flag ships and, therefore, no comity interest to be served by a restrictive interpretation of the NLRA.[16]

Act would still apply to the ILA's boycott because, unlike the picketing in *Windward*, the boycott would have accomplished its objective as soon as Occidental and the other American companies lawfully trading with the Soviets acceded to the ILA's secondary pressure. The primary dispute in this case then would have been resolved independently of any action taken by the Soviet Union.

[16] Even if the most expansive interpretation possible is given to this Court's decisions in *Windward* and *Mobile*—namely that the NLRA does not apply if its application might have a detrimental impact on international relations in general, and not just when there is a danger of conflict with foreign labor or international maritime laws or policies—these cases still would not preclude application of the Act to the ILA's boycott. Application of the NLRA in *Windward* might have resulted in a finding that the unions' activities were

The ILA asserts that the principles of comity underlying the foreign-flag ship cases would make it anomalous to find the Act applicable to a politically motivated boycott. Such an argument evinces an erroneous understanding of the meaning of comity. Comity, after all, is nothing more than a way of resolving a conflict between domestic law and foreign law by giving voluntary recognition to "the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In the foreign-flag ship cases this Court refused to apply the Act because of a possible conflict with foreign labor or maritime laws or policies. It is manifest, however, that where there is no competing labor or maritime law or policy, comity considerations are irrele-

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protected, thus depriving the foreign shipowners of any remedy, including remedies in state court. International relations may have suffered as a result. In this case, a finding that the ILA did not violate 8(b)(4) would *not* imply that the ILA's activities were protected. Because the ILA's boycott was "purely political" and thus had no bearing on the employer-employee relationship, there is in fact no conceivable argument for saying that its conduct was protected activity under the Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-78 (1978). At worst (from the perspective of the affected foreign entity), application of the NLRA would result in a finding by the Board that the ILA's boycott was neither prohibited nor protected. The foreign entity would then still have its remedy in state court. *Mobile*, 419 U.S. at 242 (Stewart, J., dissenting). In that sense, contrary to what the ILA maintains, there is no "possibility that the Board will rule in favor of the union." Brief for Petitioners at 20. Accordingly, application of the NLRA, whatever the outcome of the case, could not possibly have an adverse impact on international relations.

In this regard it should be noted that in its *amicus curiae* brief filed in this case, the American Federation of Labor and Congress of Industrial Organizations erroneously argues that *Windward* and *Mobile* preclude application of the Act if the "Union's *activity* . . . intruded significantly into the area of world trade and posed delicate issues of foreign diplomacy and international relations." AFL-CIO Brief at 8 (emphasis added). The Court's concern has uniformly been with the impact of the Board's jurisdiction on international relations, not with the impact of the complained of activity.

vant and domestic law, in this case the NLRA, should apply. As this Court concluded in *Ariadne*, "[a]pplication of United States law . . . [is appropriate if there is] no interference in the internal affairs of foreign-flag ships likely to lead to *conflict* with foreign or international law." 397 U.S. at 200 (emphasis added). The fact that the ILA's boycott is not directed at interfering with or changing a foreign entity's labor laws or policies, therefore, completely undercuts any argument that the NLRA should not apply.[17]

Put as simply as possible: the NLRA applies to the ILA's politically motivated boycott because, in contrast to the disputes at issue in the various foreign-flag ship cases, no identifiable comity interest would be served by construing the NLRA so that it would not apply.

III. THE ILA'S CLAIM THAT ITS BOYCOTT ACTIVITY IS PROTECTED BY THE FIRST AMENDMENT IS WITHOUT MERIT

There is no support for the ILA's claim of first amendment protection for the coercive activity in which it has engaged. This Court decided long ago that the prohibition of secondary boycotts by Section 8(b)(4) of the Act carries no constitutional abridgement of free speech. *IBEW v. NLRB*, 341 U.S. 694, 705 (1951).

Despite the unimpeachable constitutionality of Section 8(b)(4), the ILA insists that, at least as applied to the facts of the instant case, Section 8(b)(4)'s prohibition of secondary boycotts violates the first amendment. The

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[17] Indeed, the anamoly in this case would be to accept the ILA's argument that all domestic disputes involving foreign entities should be resolved in state court. Not only would such a result be inconsistent with the policies of the Act favoring a uniform approach to labor relations issues, the likely result of a hodge-podge of inconsistent state court results would scarcely further the interests of comity. Comment, *Protest Boycotts and Federal Labor Laws: The Russian Boycott Litigation*, 3 NW. J. INT'L. L. & BUS. 211, 249 (1981).

ILA seeks to distinguish the instant case by arguing that it involves a political, and thus a "non-economic",[18] dispute. The ILA maintains that, through their concerted refusal to work, the longshoremen were expressing their disapproval of the Soviet Union's invasion of Afghanistan. However, that this case involves a politically motivated work stoppage is of no significance, because this Court has not distinguished between labor and political disputes in applying the first amendment. As the Court stated in *Thomas v. Collins*, 323 U.S. 516, 538 (1945), "espousal of the cause of labor is entitled to [the same] constitutional protection [as] the espousal of any other lawful cause."

In any event, the ILA's conduct is not immune from reasonable government regulation simply because it may have incidentally expressed a political message.[19] This Court has repeatedly and emphatically rejected the notion that "the first and fourteenth amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing . . . as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). *Accord, Grayned v. City of Rockford*, 408 U.S. 104, 115-118 (1972); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

It is clear then that the ILA's concerted refusal to work is amenable to restrictive regulation, however "ex-

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[18] Brief for Petitioners at 37.

[19] Similarly, any suggestion that the ILA's secondary boycott serves as a means of religious or moral expression adds nothing to its claim of first amendment protection. There is no support in the case law for such a theory. Moreover, it is well settled that there is a distinction under the first amendment between the freedom to hold religious beliefs and the freedom of conduct based on religious beliefs. The latter is subject to reasonable governmental regulation. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1879).

pressive" the refusal to work may be.[20] It surely cannot be maintained that a secondary boycott constitutes "pure" speech.[21] If the ILA's illegal activity succeeds in expressing any ideas at all it does so only symbolically.[22] Government regulation of symbolic speech is constitutionally appropriate whenever it is determined that the regulation furthers "an important or substantial government interest [that] is unrelated to the suppression of free expression [provided] the . . . restriction . . . is no greater than is essential to the furtherance of that

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[20] It is questionable whether the secondary boycott at issue in this case can properly be regarded as a form of speech. This Court has stated that it "cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

[21] As the First Circuit pointed out in the decision below, the "union-directed work stoppage at issue here is much farther removed from 'pure expression' than the peaceful picketing that has been found to violate Section 8(b)(4) in numerous cases." 640 F.2d at 1379, 23a. It is noteworthy that this case thus does not involve those aspects of secondary activity regulated by Section 8(b)(4) that may give rise to serious concern over first amendment issues. *See NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607, 616 (1980); *cf. Teamsters Local 659 v. Vogt, Inc.*, 354 U.S. 284, 290 (1957); *Hughes v. Superior Court*, 339 U.S. 460, 464-65 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (all cases upholding state court injunctions against unlawful peaceful picketing).

[22] This case is in marked contrast to *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). In *Tinker*, the Court found protected the wearing of black armbands by school children protesting the Vietnam war while at school because, although the speech was symbolic, under the circumstances of the case it was "closely akin to 'pure speech.'" *Id.* at 505. The Court found dispositive the fact that "the wearing of armbands was entirely divorced from actually or potentially disruptive conduct by those participating in it." The conduct accompanying the "symbolic speech" at issue in the instant case is clearly and dangerously disruptive. Indeed the disruption, *i.e.*, the concerted refusal to work, is itself the symbol, and, therefore, clearly subject to reasonable regulation.

interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The prohibition of secondary boycotts contained in Section 8(b)(4) unquestionably meets this test.

The crucial question to be answered in applying the *O'Brien* test is whether the governmental interest is in the communicative content of the conduct or whether speech is totally unrelated to the government's objective, *i.e.*, would the conduct be subject to regulation if it communicated nothing. In the instant case the answer is clear. The "substantive evil condemned by Congress," *IBEW v. NLRB*, 341 U.S. at 705, in Section 8(b)(4) is the secondary boycott. Congress made no distinction as to the nature of the dispute which engendered secondary activity. As this Court has recognized, Congress' concern was to prevent the substantial and unjustified interference with commerce that would result from allowing a union to embroil a neutral employer in a dispute not its own. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. at 624; *NLRB v. Denver Building Council*, 341 U.S. at 692. Thus, Congress intended to put an end to injurious conduct. It did not intend to interfere with speech unrelated to illegal secondary activity. Nor, as the legislative history of Section 8(b)(4) indicates, *supra*, pp. 7-8, did Congress intend to protect otherwise illegal secondary activity merely because the activity incidentally expressed some commercial, political, religious or moral message.

Since the relevant governmental interest is "unrelated to the suppression of free expression," the remainder of the *O'Brien* test is easily satisfied. It is indisputable that Section 8(b)(4)'s prohibition of secondary boycotts furthers a legitimate and important government interest, *viz.*, the free flow of commerce. The ILA's near-monopoly of the relevant labor force insures that any ILA-sponsored boycott will result in substantial interference with the free flow of trade. The government's interest in the free flow of commerce does not depend on whether a secondary boycott is motivated by commercial

or political concerns. This Court has explicitly stated that "[t]here can be no doubt that Congress may, under its constitutional power to regulate commerce among the several states, attempt to prevent *political* strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce." *American Communications Association v. Douds*, 339 U.S. 382, 390 (1950) (emphasis added). If community interests in unimpeded traffic flow or a reasonable noise level in a school zone can justify restrictions on speech, *see, e.g., Grayned*, 408 U.S. at 115-18 (1972), *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), it is obvious that the protection of individual employers and the national economy from ruinous financial losses also justifies limited restrictions.

Similarly, *O'Brien's* requirement that the restriction on speech be no greater than is necessary to further the government's interest poses no problem on these facts. Section 8(b)(4) does not impose any superfluous restriction on the freedom of speech. It only prohibits the use of coercion to bring about unwarranted disruptions in the normal flow of commerce. *See Thomas v. Collins*, 323 U.S. at 543-544 (concurring opinion of Douglas, J.) (economic power used to influence others unprotected by first amendment). The ILA's contention that it will be denied the right "to protest and disassociate itself from the Soviet aggression" if it is found to have violated Section 8(b)(4)[33] is preposterous. If the ILA, as an association, has any constitutional rights, it certainly is not entitled to any greater constitutional protection than are its members. Individual longshoremen have the undeniable right independently to refuse to undertake work they find repugnant. What the ILA does not have the right to do is to *order* longshoremen to engage in a concerted refusal to work.[34] Nor does the ILA have a right.

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[33] Brief for Petitioners at 37 n.52.

[34] The January 9, 1980 directive of ILA President Gleason specifically states that the leadership of the ILA has "*ordered* immediate

under Section 8(b)(4) or the first amendment, to exert its formidable economic power to conscript employers into taking part in the ILA's dispute with the Soviet Union.

It is significant, of course, that the two courts of appeals which have addressed this specific issue both have concluded that the ILA's boycott is not protected by the first amendment. In the decision below the First Circuit rejected the ILA's first amendment claims, observing that "[b]y resorting to coercive tactics against neutral parties, the union has exceeded the bounds of 'political expression' in its pure form." 640 F.2d at 1379, 23a. The Fifth Circuit, in its decision in *New Orleans Steamship Association v. General Longshore Workers Local 1418*, 626 F.2d 455, 462-64 (5th Cir. 1980), *cert. granted sub nom. Jacksonville Bulk Terminals v. ILA*, No. 80-1045, similarly concluded that the ILA's conduct was subject to reasonable governmental regulation, and that an injunction against the ILA's coercive activity would in no way violate the first or the thirteenth amendments.

Thus, the ILA's claim of constitutional protection for its coercive activity is totally without merit. The only factor working in the ILA's favor is the unusual setting for this case. Were this an ordinary labor dispute involving a secondary boycott, the ILA's claim of first amendment protection would be immediately recognized as frivolous. Were this a case entirely divorced from labor relations, but involving disruption of commerce on a scale only remotely approaching the disruption resulting from the ILA's boycott (consider, *e.g.*, a political protest which blocks access to a nuclear power plant), any argument for first amendment protection would be similarly recognized as groundless. The fact that an

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suspension in handling all Russian ships and . . . cargoes" and that "[t]his *order* is effective across the board." *Allied International*, 640 F.2d at 1369 n.2., 3a (emphasis added).

otherwise illegal work stoppage also serves political ends should not and does not make it constitutionally immune from appropriate regulation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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